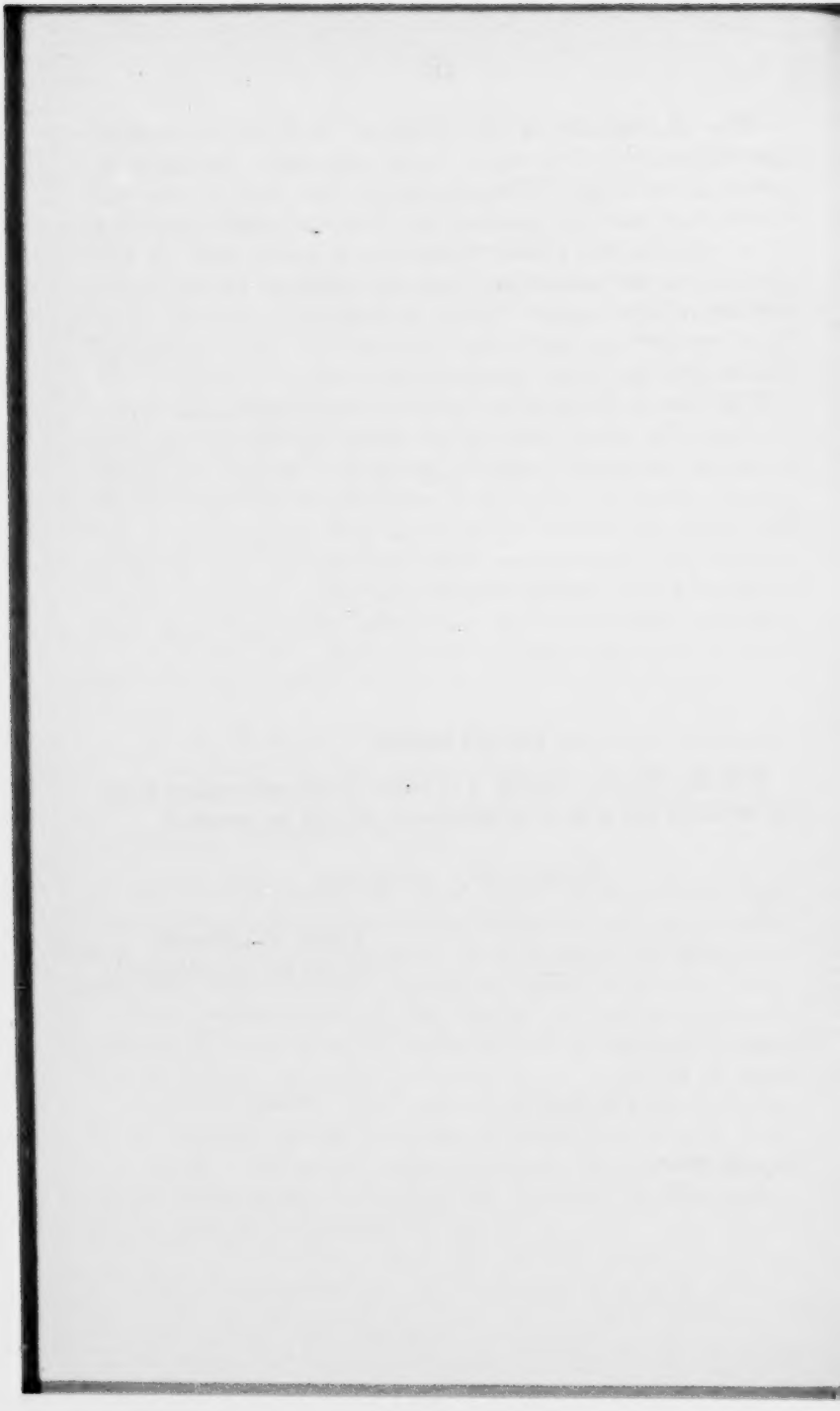

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No. 1238

In the Supreme Court of the United States

OCTOBER TERM, 1945

GEORGE F. FISH, INC. AND MICHAEL SIMON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The original opinion of the Circuit Court of Appeals (R. 214–219) and its opinion upon rehearing (R. 230–231) have not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 8, 1946 (R. 219), and was reaffirmed on rehearing on April 26, 1946 (R. 232). The petition for a writ of certiorari was filed on May 16, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Feb-

ruary 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTION PRESENTED

Whether a regulation which expressly prohibits evasion by tying agreements was violated by sales of a regulated commodity at ceiling price on condition that the purchasers buy secondary commodities.

STATUTE AND REGULATION INVOLVED

The Statute and Regulation involved are the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. § 901 *et seq.*) and Maximum Price Regulation No. 426 (8 F. R. 9546) issued under Section 2 (a) of that Act. The applicable sections of the Regulation provide:

> § 7. *Prohibition against sales above maximum prices.*—On and after July 20, 1943, regardless of any contract or other obligation, no person shall sell or deliver and no person, in the course of trade or business shall buy or receive fresh fruits and vegetables at prices higher than the maximum prices established by this regulation, and no person shall agree, offer, solicit, or attempt to do any of the foregoing. Lower prices than the maximum prices may be charged or paid.
>
> § 11. *Evasion.*—The price limitations which are set forth in this Regulation shall not be evaded, whether by direct or indirect

methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any other commodity or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying-agreement or other trade understanding or otherwise.

STATEMENT

An information in three counts was returned against petitioners in the United States District Court for the Southern District of New York. Each count charged that in connection with the sale of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 (hereinafter referred to as M. P. R. 426), petitioners unlawfully, wilfully, and knowingly evaded the regulation by demanding, compelling, and requiring the purchaser to buy an additional commodity "as a condition of the sale to him, and as an integral part thereof, of the aforesaid lettuce." The additional commodity specified in count 1 was honeydew melons; in count 2, broccoli; and in count 3, celery (R. 1–4).

The evidence for the Government may be summarized as follows:

The petitioning corporation is a wholesaler of fruits and vegetables; i. e., it receives produce in carload lots and sells at wholesale. Petitioner

Simon was employed by the corporation as a salesman (R. 90–91).

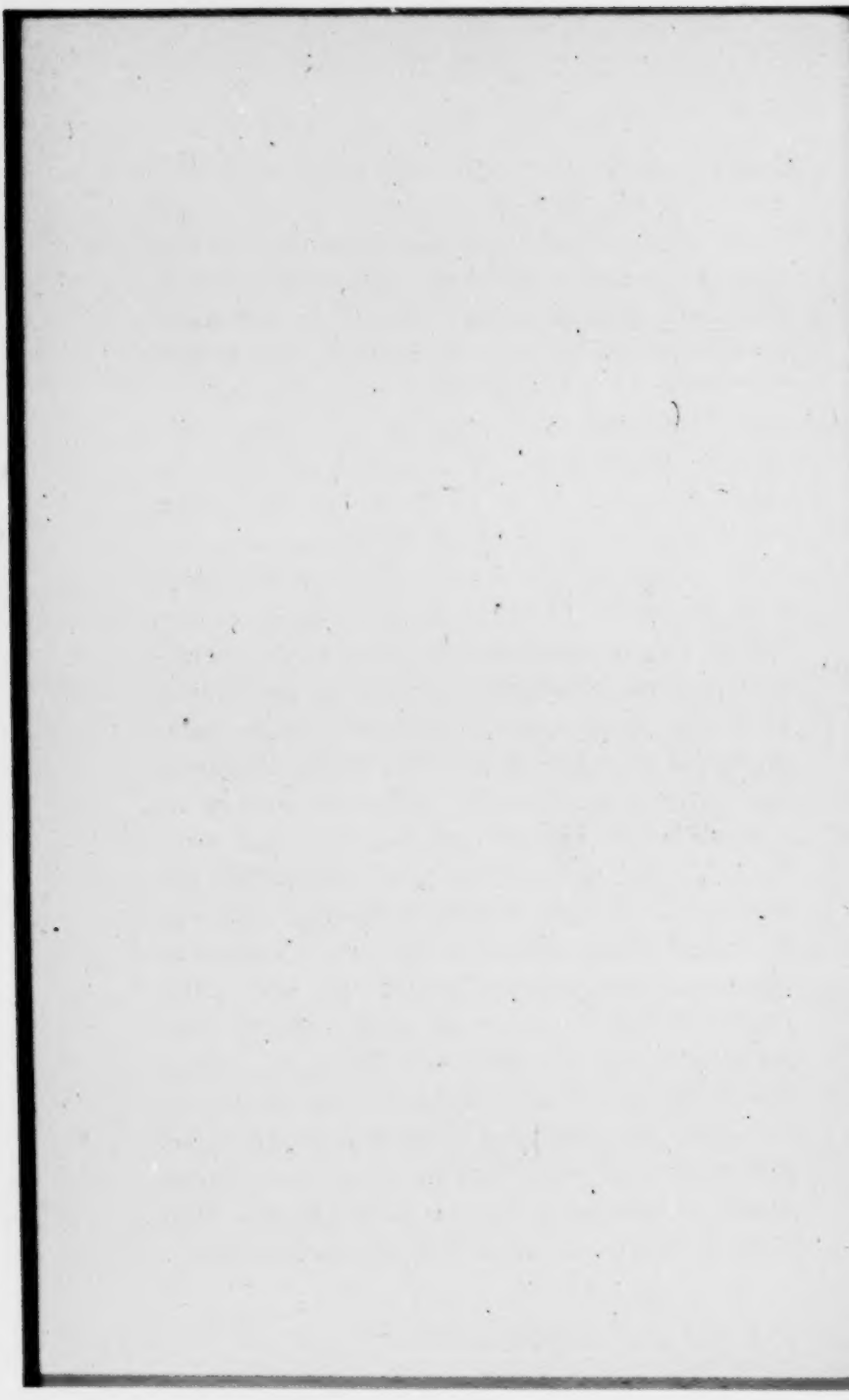
In November 1943, there was a scarcity of lettuce (R. 41, 125). On November 17, 1943, the Government witness Fierro, a dealer in fruit and produce, asked Simon for lettuce (R. 43, 45). Simon replied that if Fierro took melons he would give him lettuce, but would not sell him lettuce without the melons (R. 47). Fierro then purchased ten crates of melons at $4.75 a crate and received four crates of lettuce for which he was charged the ceiling price of $5.29 per crate (Ex. 3; R. 47, 204; R. 78–79). The market price of the melons was $4.75 (R. 120), but the market in melons was dull (R. 122).

On November 19, Fierro again asked Simon for lettuce, and Simon replied that he would give him lettuce if Fierro took some broccoli. Fierro said that he could not use broccoli that day, but Simon told him he could not get the lettuce without the broccoli. (R. 49–50.) Fierro then purchased five crates of broccoli for $35 and received five crates of lettuce for which he was charged the ceiling price (Ex. 4; R. 49, 205). The market price on this type of broccoli ranged from $6.50 to $8.00, depending on quality (R. 120). Fierro sustained a loss of $15 in reselling the broccoli (R. 72–74).

On November 27, the Government witness Zwerdling asked Simon for five crates of lettuce. Simon replied, "You have to help me out on

celery because I have too much celery on hand." Zwerdling said that he could not use celery and could get it somewhat cheaper elsewhere, but that if he had to take it, he would. Simon said Zwerdling could get the lettuce only if he purchased celery (R. 19–22, 25). Zwerdling then bought five crates of celery at $5.09 per crate and received five crates of lettuce at the ceiling price (Ex. 1; R. 25, 204). The market price of the celery ranged from $3 to $5.50, but the market was dull on November 27 (R. 120–121).

In submitting the case to the jury, the judge read Section 11 of M. P. R. 426 (*supra*, p. —), defined "tie-in agreement" as used in the regulation as "an agreement by which a prospective purchaser of a commodity regulated by the price regulation is required, in order to get that commodity, to purchase some other commodity as a condition of the sale of the regulated commodity," and charged the jury that petitioners were guilty if they compelled the purchasers to buy other commodities in order to get lettuce, as charged in the information (R. 152–153). The jury returned a verdict of guilty against both petitioners on all three counts (R. 157). Simon was sentenced to imprisonment for six months on each count, the sentences to run concurrently, but execution of sentence was suspended and Simon placed on probation for one year (R. 6). The corporation was fined $1,500 on each count (R. 5).



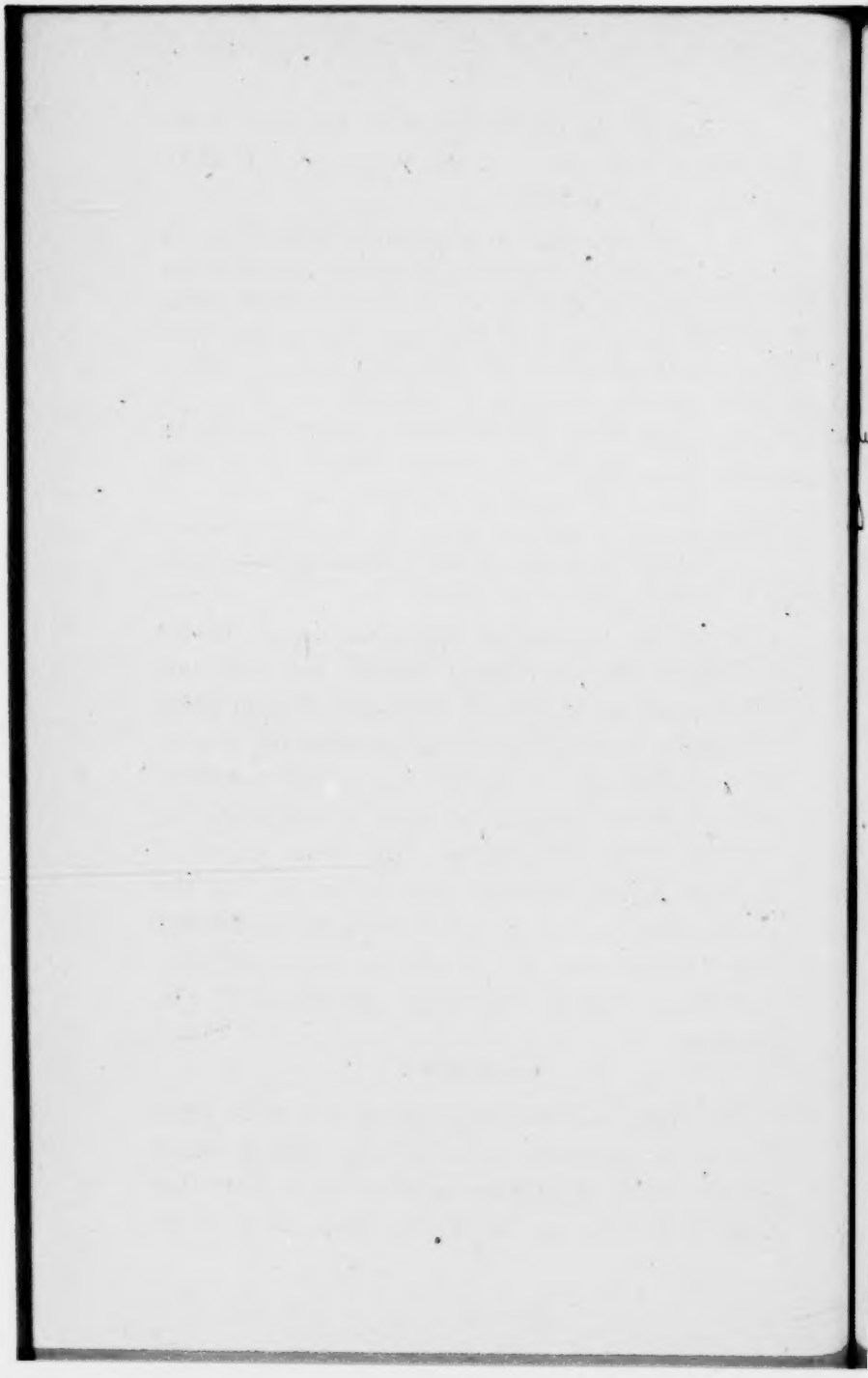
On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment (R. 219), stating (R. 216–217):

> A rationed item cannot be said to be actually sold at ceiling when, although the price quoted on it is the maximum legal price, there is at the same time an enforced sale of an unrationed commodity. It seems obvious to us, as it certainly would to the consuming public, that when a customer who desires to obtain lettuce must buy honeydew melons, broccoli, or celery in order to get it, he gives a consideration above and beyond that fixed by the maximum price regulation.

After the decision of this Court in *M. Kraus and Bros. Inc.* v. *United States,* No. 198, this Term, decided March 25, 1946, the circuit court of appeals granted a petition for rehearing to consider petitioners' contention that the *Kraus* decision required reversal of their convictions (R. 220–225, 232). Thereafter, the circuit court of appeals again affirmed the judgment on the ground that the regulation involved in the present case "unlike that in the *Kraus* case, expressly prohibited evasion 'by tying agreement,'" (R. 230–232).

ARGUMENT

The decision of the court below is clearly right and is in accord with the decision of two other circuit courts of appeals handed down since this Court's decision in the *Kraus* case. *Coffin-Red-*



ington Co. v. *Porter* (C. C. A. 9), decided May 22, 1946; *Bowles* v. *Cudahy Packing Co.* (C. C. A. 3), decided March 29, 1946. Petitioners argue that, despite the fact that the regulation here involved specifically forbids evasion of maximum prices by "tying agreements," their convictions for compelling tie-in sales cannot stand under the decision of this Court in *M. Kraus & Bros. Inc. v. United States, supra,* (Pet. 7–11). This argument disregards the fact that this Court based its decision in the *Kraus* case on the absence of a specific prohibition against tying agreements in the poultry regulation (M. P. R. 269) there involved. This Court recognized that for the purposes of enforcement proceedings, it must be assumed that the Administrator legally could include tying agreements involving the sale of valuable secondary commodities at their market value among the prohibited evasion devices, but held that in the poultry regulation the Administrator had not adequately expressed his intention to do so. Noting that the pertinent provision of the poultry regulation provided simply "that price limitations shall not be evaded by any method, direct or indirect, whether in connection with any offer or sale of a price-regulated commodity alone 'or in conjunction with any other commodity,' or by way of any trade understanding 'or otherwise,' " the opinion of Mr. Justice Murphy then stresses that "No specific mention is made of tying agreements or combination sales" (Slip opinion, p. 6).

The omission upon which the decision in the *Kraus* case turned was supplied in the fresh fruits and vegetables regulations, M. P. R. 426, here involved. In pertinent part the evasion clause of that regulation provides that "the price limitations which are set forth in this Regulation shall not be evaded * * * by tying agreements * * *" (Section 11). As the court below stated (R. 231), the provision thus meets the requirement of the *Kraus* decision for an explicit statement of the Administrator's intent to include tying agreements among the prohibited evasive devices without regard to the value of the secondary commodity. All persons subject to the regulation were plainly informed that the imposition of a "tying" requirement was conduct which was considered evasive so as to bring the criminal penalties of the Act into operation. One who examined this and other regulations and compared them could not draw the inference which was open in connection with the regulation in the *Kraus* case that, because of the presence of an express prohibition of tie-in sales in some regulations and its absence from the regulation there involved, such sales were not *per se* illegal under that regulation. Here there is express mention of tying agreements. Sellers have been told, not simply that they may not evade through sales of price-regulated commodities "in conjunction with any other commodity," but that they may not evade by means of a "tying agreement."

Petitioners argue that the words "tying agreement" have no clear meaning and hence that their inclusion in the present regulation adds nothing to the clause before this Court in the *Kraus* case (Pet. 8, 9). As the opinion in the *Kraus* case states, however, the practice of requiring the purchase of one commodity as a necessary condition to the purchase of another is "commonly known as a 'combination sale' or a 'tying agreement.' "[1] Furthermore, the Price Administrator has consistently described tying agreements as meaning the compelled sale of a secondary commodity, even where that commodity has value and is sold at the market price. (See, e. g., the interpretation referred to in footnote 6 of the *Kraus* decision; OPA Service (Pike and Fisher), Vol. I, p. 2:812.) The testimony at the trial shows that petitioners were aware that the Office of Price Administration had so interpreted tying agreements and that it deemed such a practice illegal (R. 117–118).

Petitioners further argue that tying agreements are not forbidden *per se* because the regulation prohibits evasion by other methods, such as offer, solicitation, etc., which clearly are not in themselves illegal (Pet. 9). This argument is based on the

[1] Petitioners point to the fact that the opinion of this Court uses the terms "combination sale" and "tying agreement" interchangeably as support for their contention that the term "tying agreement" adds nothing to the language of the clause before this Court in the *Kraus* case (Pet. 9). There was, however, no specific prohibition in that regulation of either tying agreements or combination sales.

erroneous assumption that all ~~methods of evasion~~ these terms are listed in the regulation without differentiation. The regulation is not so phrased. The words "tying agreement" in Section 11, the evasion section, are not part of the phrase in which the other listed terms are used. The section provides that the price limitations "shall not be evaded * * * *in connection with* any offer, solicitation, agreement, sale, delivery, purchase, or receipt of * * * vegetables alone or in conjunction with any other commodity, * * * *or by* tying agreement." [Italics supplied.] It is thus clear that while, of course, offers of sale or sales are not *per se* forbidden by this clause, evasion by tying agreements is expressly prohibited.

Maximum Price Regulations 169,[2] § 1364.406, 287,[3] § 15, and 330,[4] § 9, relating to other products, do, as petitioner states, specifically prohibit conditioning the sale of one commodity upon the purchase of another, as well as evasion by means of tying agreements. However, the fact that the Administrator has twice included the admonition in some regulations does not mean that it should be disregarded where it is stated clearly once. As the structure of the regulations demonstrates, the additional clauses are part of a series which elaborates upon and illustrates types of evasive conduct already prohibited. Thus, § 1364.406 of Regulation 169, in

[2] 8 F. R. 4099.
[3] 8 F. R. 9126.
[4] 8 F. R. 11041.

subsection (a), prohibits evasion by tying agreement and other devices, and then subsection (b) continues:

> (b) Specifically, but not exclusively the following practices are prohibited:
>
> * * * * *
>
> (5) offering, selling, or delivering beef or veal on condition that the purchaser is required to purchase another meat item or items or any other commodity.

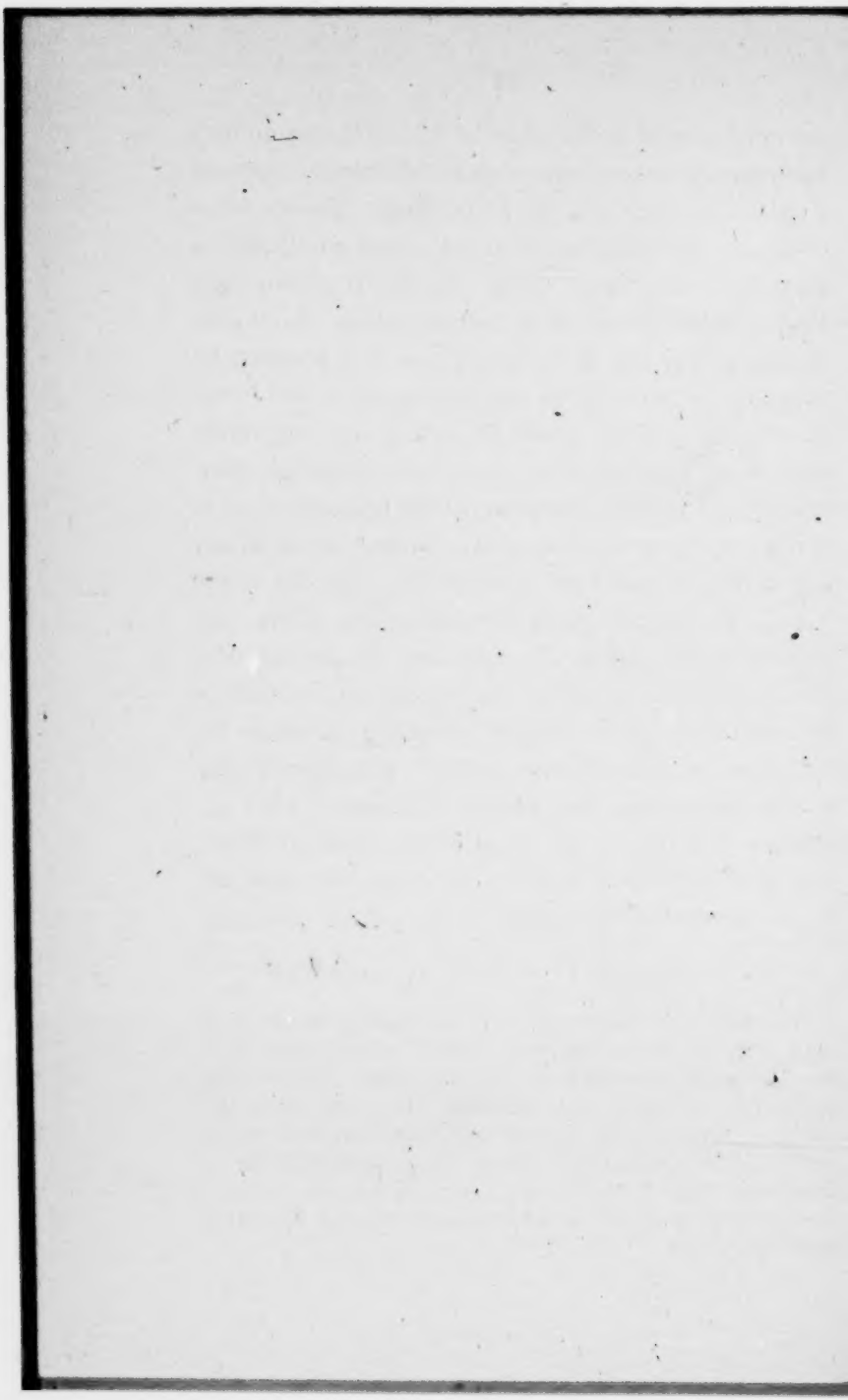
Tying agrements are not the only evasive devices which are twice prohibited by this section. Thus, for example, subsection (a) forbids evasions by means of transportation charges, and paragraph (b) (6) prohibits making a charge for delivery on the basis of a route different from that actually followed. Again, subsection (a) forbids evasion by means of service charges, and then a paragraph of subsection (b) repeats that a seller may not charge for any service for which a specific allowance is not provided by regulation ~~(b) (8)~~. These illustrative provisions do not add to the previous prohibitions, nor does their absence from the regulation here involved serve to differentiate it from the regulations cited.

This Court in the *Kraus* case recognized that the Administrator could prohibit tie-in sales as evasions of maximum prices, even if the secondary commodity has value and is sold at the ceiling price. The reason why the Administrator considered all such arrangements evasive violations

without regard to the price at which the secondary commodity is sold, and prohibited them to prevent profiteering is not hard to find. Tie-in sales create an artificial demand for other commodities and force additional sales. In terms of contract law, a seller receives a consideration above the ceiling price, for the primary product because he receives, in addition to the ceiling price, the benefit of making a sale which he would not have made except as consideration for the regulated commodity. The very purpose of the imposition of a tying requirement is to obtain some benefit which could not be obtained without it. By the same token, the buyer pays consideration above the ceiling price, since, in addition to paying the maximum prescribed by the regulation, he suffers the additional detriment of making a purchase he otherwise would not have made.[5] This Court held in the *Kraus* case that the prohibition of such an evasive practice in the regulation there involved was not sufficently explicit to meet the rule of strict construction applied to penal statutes.

[5] In *Coffin-Redington Co.* v. *Porter* (C. C. A. 9), decided May 22, 1946, the court said:

"The first objection urged is to the finding of the trial court that distilled spirits were sold at prices higher than the maximum permitted by the regulation, whereas the parties had stipulated that 'each item, itself, was within the ceiling.' However, the court found that there were tying agreements or combination sales in violation of § 7.8 (b) of Regulation 445. If this finding has support in the evidence, then the finding of sales at prices in excess of those allowable logically follows. * * *"



That deficiency is met by the present regulation which, in express terms, prohibits evasion by "tying agreements." The court below therefore properly concluded that the decision in the *Kraus* case did not affect the validity of petitioners' convictions.

CONCLUSION

The decision below is correct, and is in accord with the decision of this Court in *M. Kraus & Bros. Inc.* v. *United States.* We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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